

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO. AAU0002 OF 1999S**  
**(High Court Criminal Case No. 9 of 1998/S)**

**BETWEEN:**

**YILIKESA DOBUI**

*Appellant*

**AND:**

**THE STATE**

*Respondent*

**Coram:**

The Hon. Sir Moti Tikaram, President  
The Hon. Justice Ian R. Thompson, Justice of Appeal  
The Hon. Justice Gordon Ward, Justice of Appeal

**Hearing:**

Monday, 23 August 1999, Suva

**Counsel:**

Mr. S. R. Valenitabua for the Appellant  
Ms. R. Olutimayin for the Respondent

**Date of Judgment:**

Friday, 27 August 1999

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**JUDGMENT OF THE COURT**

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The appellant appeared in the Kadavu Magistrates' Court on 24 April 1998 charged with selling liquor without a licence, contrary to section 77(1) of the Liquor Act. He pleaded guilty, was convicted and sentenced.

On 30 October 1998, he filed a notice of motion in the High Court seeking revision of the conviction and sentence under sections 323 and 325 of the Criminal Procedure Code on the basis that the plea of guilty was equivocal and the case should be remitted to the magistrates' court for trial on a plea of not guilty. Two affidavits were exhibited to the notice, one of which was by the appellant. Both affidavits deposed to the facts of the case and not to events at the hearing or to the accuracy of the record.

The sole basis of the appeal to this Court is the question of equivocation in the plea. For reasons we have set out below, we do not consider that that raises a question of law only and it does not, therefore, give a right of appeal. However, counsel for the respondent has stated a twofold preliminary objection to jurisdiction which we consider raises important issues which should be examined. First, she argues that this was a matter that could have been appealed and, as no appeal was made, the High Court had no jurisdiction to hear it under its revisionary powers.

The power of the High Court to revise proceedings in the magistrates' court is given by section 323 of the Criminal Procedure Code and the extent of the power and the manner in which it should be implemented is set out in section 325. Counsel for the respondent relies on section 325(5) which restricts the right to seek revision where there is a right of appeal that has not been pursued:

*“(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”*

Section 308 of the Code gives a wide right of appeal from the magistrates' court. Any judgment, sentence or order may be appealed on matters of fact or of law. Section 309 places certain limits on that right and, where there was a plea of guilty, subsection (1) restricts appeal to challenging the extent and legality of the sentence.

Counsel for the appellant contends that, as the plea at the lower court was one of guilty, section 309 (1) precludes appeal and leaves revision as the only remedy available. That

is not correct. Where an accused person wishes to appeal on the ground that the plea he entered was equivocal or is otherwise not a true admission of guilt, he is not restricted by section 309(1). His appeal is based on the assertion that, on the face of the record, it was not a true admission of guilt. In this case, the appellant had a right to challenge the plea by an appeal to the High Court. He did not and the restriction in section 235(5) applies. The learned judge should not have entertained an application for revision at the instance of the party who could have appealed.

We would also question the judge's decision to allow evidence by affidavit.

Section 323 provides:

*"The High Court may call for and examine the record of any criminal proceedings before any magistrates' court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrates' court."*

The terms of this section limit the High Court to an examination of the record in order to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order or to the regularity of the proceedings in the lower court. Whilst the Court may hear the parties if it so wishes under section 326, there is no specific provision to allow further evidence. There may be instances when the judge would require evidence of events **at the trial** where there is a challenge to the accuracy of the record but the power given by section 323 is to examine the record as it stands. Although the point was not argued before us and so we have not reached a decided opinion, we are doubtful whether further evidence **of the facts of the case**, as in the affidavits in the present case, can ever be made part of the record or should be admitted.

Where an appellant wishes to introduce further evidence of facts that may change the basis upon which he was convicted, normally the proper course should be to appeal and seek leave to adduce the fresh evidence.

The second limb of the respondent's challenge to jurisdiction relates to this Court. We understood Ms Olutimayin to suggest that, if the case should not have been heard by the High Court in its revisional jurisdiction, then there was no proper appeal and the right to appeal to this Court under section 22 of The Court of Appeal Act does not exist. If that is what she was suggesting, she missed the point. The learned judge purported to hear the case under his revisionary jurisdiction. The question of whether he had the power to do so is a matter of law that can be appealed to this Court under section 22. In any event, for the reasons we have stated below, we do not accept that the High Court erred in deciding to exercise its revisional jurisdiction in respect of the sentence.

Having said that, the grounds of appeal before us do not raise that issue and are based solely on the question of equivocation. In the present case, the sole challenge depends on the meaning and effect of the plea in mitigation. That is not an issue of law only and thus gives no right of appeal to this Court under section 22, as a second appeal. However, in the event, the learned judge ruled on it and his conclusion, with respect, was clearly correct. The authorities have long established the principle that any question about the propriety of a plea tendered shall be ascertained on the record alone.

The record of the magistrates' court shows the mitigation as:

*"Ask for leniency first business - closed down by the owner - tried it out on old licence. Tried to renew it - was still waiting when ceased."*

Counsel for the appellant suggests that the reference to an old licence should have alerted the magistrate to a possible problem about the plea. The learned judge clearly felt that it gave no such indication and we agree. There was no suggestion in the magistrates' court that the appellant held a licence at the time of the offence and, if the reference is to the licence held by the previous operator of the premises, there was no suggestion it had been transferred. In the face of that, the learned judge was right to find no evidence of an equivocal plea.

The appeal must be dismissed but, before leaving the case, there is one further matter that should be mentioned. The magistrate ordered a fine of \$75.00, 12 months imprisonment suspended for 2 years and forfeiture of the liquor seized. The maximum penalty prescribed for a first contravention of section 77(1) of the Liquor Act is a fine of \$200.00 or imprisonment for six months or both. Neither party appealed the sentence and so section 325(5) prevents revision of the sentence **at the instance of either party**. However, section 325 (1) gives the High Court power, in the case of a conviction, to exercise on revision any of the powers it would have when sitting as an appeal court. That applies, not only when the court has called for the record or has had the case reported to it, but also to any proceedings "which otherwise comes to its knowledge".

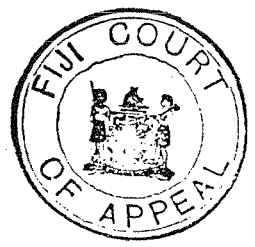
In this case, the judge, faced with a sentence that was manifestly unlawful on a record that had come to his knowledge, clearly felt he could not let it stand. The sentence of imprisonment imposed clearly exceeded what could lawfully have been imposed and furthermore, on the facts of the case as stated on that record, any sentence of imprisonment for

a first offender, was inappropriate; so the learned judge set the order of imprisonment aside in its entirety. In so doing he was acting within his powers of revision.

The appeal is dismissed and the order of the judge setting aside the sentence of imprisonment is affirmed.

*M. Tikaram*

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Sir Moti Tikaram  
President



*I. R. Thompson*  
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Justice Ian R. Thompson  
Justice of Appeal

*Gordon Ward*  
.....  
Justice Gordon Ward  
Justice of Appeal

**Solicitors:**

Tuberi Chambers, Suva for the Appellant  
Office of the Director of Public Prosecutions, Suva for the Respondent